Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, formerly known as BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

vs.

KENNETH E. BYRD,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Missouri

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent admits in his Brief In Opposition that there is a conflict between the federal circuit courts on the issue of whether the plaintiff has the burden to produce evidence of the present value of his claimed future pecuniary damages in an action under the Federal Employers' Liability Act 45 U.S.C. §§ 51-60. The fact that there is a clear split in the federal circuits on the exact which Petitioner is requesting this Court to grant certiorari, supports Petitioner's argument that this Court needs to address the issue.

Furthermore, this case presents the burden of proof issue in a straight forward manner which highlights the importance and substantive impact the issue. The voir dire of the jury revealed that no juror knew how to calculate the present value of future pecuniary damages. It was clear that without the assistance of some evidence relating to the present value of Respondent's future pecuniary damages, the jury would be unable to calculate the present value of Respondent's future pecuniary damages. However, the trial court allowed Respondent to submit his claim for future pecuniary damages to the jury when the Respondent offered absolutely no evidence whatsoever on this issue. Respondent argues in his Brief in Opposition that he offered "evidence" in his closing argument however, the law is clear that neither opening or closing argument is evidence. *Vanskike v. ACF Industries*, 665 F.2d 188, 210-211 (8th Cir. 1981).

The Missouri Court of Appeals' decision in this case circumvents the present value rule as articulated by this

Court because the practical reality of the Missouri Court of Appeals' decision is that Respondent was allowed to recover his future pecuniary damages in a FELA action without a reduction to present value which is clearly in violation of this Court's established precedent for over eighty years. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988); *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985); *Chesapeake & Ohio R.R. Co. v. Kelly*, 241 U.S. 485, 491 (1916).

I. THE SUPREME COURT CASE CITED BY RESPONDENT IS NOT CONTRARY TO PETITIONER'S POSITION.

Respondent, Kenneth E. Byrd's ("Respondent") use of *Louisville & Nashville R.R. Co. v. Holloway*, 246 U.S. 525 (1918), is seriously misleading. The Court in *Holloway* held that a Defendant railroad may not complain about a general instruction on damages if the Defendant railroad did not specifically request a specific instruction that the plaintiff's damages must be reduced to present value. The *Holloway* Court never discussed what evidence was admitted at trial to support the instruction and the Court most certainly never held or even implied that a jury could properly reduce to present value without the assistance of evidence. In fact, Respondent did not cite *Holloway* to support his argument, instead, Respondent stated "*Holloway*" is interpreted as holding".

Additionally, under existing Missouri law, MAI 8.02, which instructs the jury that "any award of future pecuniary damages must be included at present value," is the exclusive means of instructing the jury regarding present

value and no futher instruction setting forth how present value is to be calculated is permitted. *Wilson v. Consolidated Rail Corp.*, 875 S.W.2d 178, 183 (Mo.App. 1994). Therefore, Petitioner was foreclosed from requesting any additional instruction regarding present value. *Id.* Furthermore, it is not the Petitioner's burden to present evidence of or instruct the jury on the present value of the Respondent's future pecuniary damages.

II. RESPONDENT ADMITS IN HIS BRIEF IN OPPOSITION THAT THERE IS A CLEAR SPLIT IN THE FEDERAL CIRCUITS ON THE ISSUE RAISED IN THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Respondent's argument in Sections II and III of his Brief in Opposition clearly shows that there is a split in the federal circuits on the exact issue which Petitioner wants this Court to grant certiorari. The Third Circuit has consistently held that a plaintiff has the burden to produce evidence of the present value of his claimed future pecuniary damages. *Ballentine v. Central R.R. of New Jersey*, 460 F.2d 540 (3rd Cir. 1972), *cert. denied*, 409 U.S. 879 (1972); *DiSabatino v. National R.R. Passenger Corp.*, 724 F.2d 394 (3rd Cir. 1984); *Gorniak v. National R.R. Passenger Corp.*, 389 F.2d 481 (3rd Cir. 1989). The Fifth, Sixth, Seventh, and Eighth Circuits have held that the defendant has the burden to produce evidence relating to the present value of future pecuniary damages. *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665 (5th Cir. 1974); *Pennsylvania R.R. Co. v. McKinley*, 288 F.2d 262 (6th Cir. 1961); *Heater v. C&O Ry. Co.*, 497 F.2d 1243 (7th Cir. 1973), *cert. denied, C&O Ry. Co.*, 419 U.S. 1013 (1974); *Duncan v. St. Louis-San Francisco*

Ry. Co., 480 F.2d 79 (8th Cir. 1973), *cert. denied, St. Louis-San Francisco Ry. Co.*, 414 U.S. 859 (1973). The fact that there is a clear split in the federal circuits on the exact issue which Petitioner is requesting this Court to grant certiorari, supports Petitioner's argument that this Court needs to address the issue.

Contrary to Respondent's representations, the Ninth and Tenth Circuits have not held that a FELA plaintiff does not bear the burden of producing evidence of the present value of his future pecuniary damages. The Ninth Circuit has split the burden of proof and held that the plaintiff has the burden to produce evidence about the need to adjust a lump sum award for inflation, and the defendant has the burden to produce evidence about the need to discount a lump sum award because of the effect of interest rates. *Alma v. Manufacturers Hanover Trust*, 684 F.2d 622 (9th Cir. 1982). Furthermore, the Tenth Circuit in *Miller v. Union Pacific R.R. Co.*, 900 F.2d, 223, 226 (10th Cir. 1990) never addressed the issue and does not support either party's argument.

III. THERE IS A SPLIT IN THE STATE COURTS ON THE ISSUE RAISED IN PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Respondent's argument that there is no split in the state courts on the issue raised in Petitioner's Petition For Writ of Certiorari is without merit. The Supreme Court of Alabama in *Reusch v. Seaboard System R.R.*, 566 So.2d 489 (Ala. 1990), *cert. denied*, 498 U.S. 1012 (1990), held:

> Under the applicable federal decisions, we must conclude that [plaintiff] did not produce the

> evidence necessary to sustain his claim for loss of future earning. The trial court did not err by instructing the jury that it could not award Reusch damages for future earnings and loss of earning capacity.

Upon review of the evidence, the Supreme Court of Alabama stated that:

> Reusch did not offer evidence of the interest rate on the best and safest investment as well as an application of a discount rate to his alleged stream of earnings. Finally, Reusch offered no evidence of the effect of inflation on any stream of earnings he may have had.

In stark contrast to the *Reusch* decision, the Virginia Supreme Court has placed the burden to produce evidence relating to the present value of a FELA plaintiff's future pecuniary damages on the defendant. *CSX Transportation, Inc. v. Casale*, 441 S.E.2d 212, 216 (Va. 1994). The Missouri Supreme Court has held that neither party needs to produce any evidence because "[i]n the absence of any contrary indication, we can assume each juror in his or her respective fashion complied with the instruction and determined the present value of future wage loss." *Anglim v. Missouri Pacific Railroad Co.*, 832 S.W.2d 298, 309 (Mo.banc 1992), *cert. denied, Missouri Pacific Railroad Co. v. Anglim*, 506 U.S. 1041 (1992).

Furthermore, it is true that the state supreme courts are seeking guidance from this Court on the issue raised in Petitioner's Petition for Writ of Certiorari. In *CSX Transportation, Inc. v. Casale*, 441 S.E.2d 212, 215 (Va. 1994) the court noted:

> To date, the Supreme Court has not decided the issue, and the federal circuit courts are in conflict on the question. . . . Therefore, without the availability of a controlling and explicit federal ruling, we must establish the rule to be applied in state courts in Virginia.

IV. THERE IS NO FACTUAL DISPUTE TO BE RESOLVED BY THIS COURT

There is no factual dispute that the jury in this case revealed in voir dire that they did not know how to calculate the present value of future pecuniary damages. Neither the trial court nor the Missouri Court of Appeals disputed this fact.

Under these undisputed facts, the Missouri Court of Appeals' decision in this case circumvents the present value rule because Respondent was allowed to recover his future pecuniary damages without a reduction to present value which is clearly in violation of this Court's established precedent for over eighty years. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 335 (1988); *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985); *Chesapeake & Ohio R.R. Co. v. Kelly*, 241 U.S. 485, 491 (1916). The voir dire of the jury revealed that no juror knew how to calculate the present value of future wage loss. The Respondent struck the only juror which was capable of making a present value calculation. The Respondent then offered no evidence whatsoever relating to the present value of his future pecuniary damages. It was impossible for this jury to calculate the present value of Respondent's future pecuniary damages. However, the Missouri Court of Appeals still affirmed the trial court's decision to allow Respondent to recover his future pecuniary damages. The Missouri Court of Appeals left the present

value calculation to the jury which had no knowledge how to calculate present value, and then assumed that the jury would determine the present value of Respondent's future pecuniary damages. This decision drastically undermines the present value instruction and essentially makes it meaningless.

CONCLUSION

This case gives the Court the perfect vehicle to address an issue which has caused a conflict between the federal circuit courts and a conflict between the state courts. The issues raised in this Petition for a Writ of Certiorari were properly preserved, and are substantive issues which need a decisive answer from this court. Furthermore, this case highlights the need for an answer from this court because the jurors in this case were instructed to follow the law, but it was impossible for the jurors to follow the law as articulated by this court in *Chesapeake & Ohio R.R. Co. v. Kelly*, 241 U.S. 485, 491 (1916). Wherefore, Petitioner respectfully requests that this Court issue a Writ of Certiorari.

Respectfully submitted,

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